



LATAH COUNTY  
**BOARD OF COMMISSIONERS**

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October 29, 1997

Office of the Secretary  
Federal Communications Commission  
Washington, D. C. 20554

RE: Notice of Proposed Rule Making, FCC 97-296, MM Docket No 97-182

Dear Members of the Federal Communications Commission:

Pursuant to the above entitled Notice of Proposed Rule Making, the Board of County Commissioners of Latah County, Idaho submits the following comments with respect to the proposed rules:

**I. Introduction and Background.**

Latah County is a rural county in North-Central Idaho. The county has a population of approximately 30,000, and its economy is based primarily on agriculture, timber harvest and its location as the home of the University of Idaho. In addition, Washington State University is located in Pullman, Washington, eleven miles from our county seat in Moscow. As will be explained further in these comments, Latah County has had considerable experience with litigation related to the siting of broadcast towers. The proposed rules have been thoroughly reviewed by both the Latah County Planning Commission and the Board of County Commissioners in consultation with our civil counsel, Deputy Prosecuting Attorney Douglas W. Whitney.

**II. Comments on the Proposed Rules.**

**A. Proposals for preemption of state and local laws and regulations.**

1. Latah County strongly agrees with the preemption of state and local laws and regulations to the extent that said preemption would prohibit the denial of a request to place, construct or modify a broadcast antenna on the basis of the environmental or health effects of radio frequency emissions to the extent that such facility has been determined to comply with the Commission's regulations and/or policies concerning such emissions. This is because local zoning authorities in a jurisdiction such as ours are citizens elected or appointed to exercise zoning authority on a part-time basis. As such, they have neither the time or the expertise to make well informed decisions with

regard to the effects of radio frequency emissions, and it only makes sense that we should be able to rely on the technical expertise of the Commission, in consultation with ANSI, the EPA and other federal agencies to make well-researched decisions with regard to this issue.

2. Latah County agrees with the preemption of state and local laws and regulations to the extent that said preemption would prohibit denial of a request to place, construct or modify a broadcast antenna on the basis of interference effects on existing or potential communications providers, end users broadcasters or third parties, to the extent that the broadcast antenna facility has been determined by the Commission to comply with the applicable Commission regulations and/or policies concerning interference. This position is for the same reasons set forth in the preceding paragraph. However, Latah County feels the proposed rule should be modified to permit local government to deny such a permit when, in the judgment of the zoning authority such a broadcast facility would interfere with telecommunications facilities operated by state or local government agencies, particularly for law enforcement or other public safety purposes.

3. Latah County agrees with the preemption of state and local laws and regulations to the extent that said preemption would prohibit denial of a request to place, construct or modify a broadcast antenna on the basis of lighting, painting and marking requirements, to the extent that the facility has been determined by the Federal Aviation Administration (FAA) or the Commission to comply with applicable FAA and Commission regulations and/or policies regarding tower lighting, painting and marking. This position is for the same reasons set forth in the preceding paragraphs. However, this agreement is limited to those regulations as they currently exist. If said regulations, in the future, require additional marking and/or lighting which is inconsistent with local land use ordinances and plans, the local government should have some recourse or ability to deny the application of the additional lighting or marking requirements.

4. Latah County strongly objects to the proposed rule which would require the local government to act on such a request to construct, modify or relocate a broadcast transmission facility within the time frames set forth in the proposed regulation. Due to the notice and hearing requirements of Idaho state law, it is virtually impossible for such a decision to be made within the time frames set forth in the proposed rule. This is especially true in those cases where a rezoning action is required to permit to construction of a transmission facility, thereby requiring that such a decision be made after public hearings conducted by both the local Planning and Zoning Commission and the Board of County Commissioners, in which there is a fifteen day public notice requirement for each hearing and a reasonable time must be available for the Commissions to deliberate and make a decision. This rule should be modified to permit up to ninety (90) days for such a decision in all cases. Otherwise, the proposed

time limits would likely constitute an unconstitutional denial of due process to those citizens opposed the construction or modification of a broadcast facility.

5. Latah County strongly objects to the proposed rule which would place the burden of proof on the promulgating authority to demonstrate that a state or local law or regulation which may impair the ability of an operator to site or modify such a facility is a clearly defined and expressly stated health or safety objective (other than one related to radio frequency, interference or lighting and marking regulations) and the federal interests in service to the public and fair and effective competition among competing electronic media. The burden of proof and persuasion should be placed on the operator of the proposed transmission facility to show that the law or regulation does not meet those criteria.

6. Latah County submits that the proposed rules should be modified to provide a procedure wherein, provided that the local jurisdiction has set aside one or more reasonable land areas in which such transmission facilities may be constructed, that it may prohibit siting of new facilities in other areas. This is particularly important in an agricultural community where the farmers are dependant upon aerial cropdusting for their livelihood. Absent the ability to locally control the siting of such facilities, there is an unacceptable potential that agricultural lands could be surrounded by a profusion of antenna towers which would prohibit this vital use of our air space or channel flight routes over residential areas in a way which could impose serious health and safety risks to the residents.

7. Latah County submits that the proposed rules should be modified to allow denial of a request for placement of a new transmission facility or increase in the height of an existing facility for safety or aesthetic reasons unrelated to radio frequency emissions, electronic interference or marking and lighting requirements. The FCC and FAA simply cannot know enough about the local geographical and demographic and building development status in any area to make a good decision with regard to those factors.

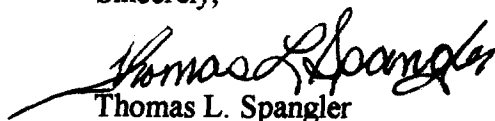
8. Latah County strongly objects the provisions of the proposed rule in which denial of approval to place, construct or modify a broadcast antenna must be submitted to an Alternative Dispute Resolution process administered by the Federal Communications Commission, or would grant the Commission with power to issue a binding declaratory ruling on the issue. This procedure would not only constitute an unlawful unfunded federal mandate, due to the cost of litigating such a matter before the Commission at long distance, but would unconstitutionally violate fundamental principles of federalism. Applicants for and opponents to the placement or modification of transmission facilities have an adequate remedy at law via access to the state court system, and mandated federal arbitration will simply not withstand constitutional examination, nor would it expedite resolution of the matter.

**B. Comment regarding litigation and delay experienced with transmission facility siting issues:**

Latah County has experienced some seven years of litigation regarding the approval of conditional use permits for the construction of two broadcast transmission towers for KUID-TV operated by the University of Idaho and KZZL Radio operated by Mr. Robert Hauser on Paradise Ridge south of the City of Moscow. This litigation is ongoing. It has proceeded to Idaho Supreme Court once. See *Butters v. Hauser*, 125 Idaho 79, 867 P.2d 953 (1993), in which the Court overturned the County's decision to grant the permit for the KZZL tower. After this decision, the County amended its ordinance to modify the criteria for granting conditional use permits, whereupon Hauser applied for and was granted a new permit. That matter remains in litigation, with the matter now pending oral argument before the Idaho Supreme Court on the issue of whether the opponent has standing to challenge the procedures used to amend the ordinance by means of a declaratory judgment. She also has a separate action pending before the District Court on issues related to whether the county acted in accordance with its comprehensive land use plan and zoning ordinance in granting the permit. Briefing and decision on that matter has been held in abeyance pending a decision on the standing and declaratory judgment issues. The decision regarding the KUID tower has been pending before the District Court for several years, the Court having decided to wait until the KZZL tower litigation is final before issuing its decision. The major issues initially asserted by the opponent in these cases were the health effects of radio frequency emissions and interference with her telephone. Although she abandoned the radio frequency emission issue before the court, much of this litigation could probably have been avoided by a preemption rule regarding those issues. This litigation has been at great cost and effort on the part of all parties, and the final resolution is not in sight.

Latah County is appreciative of the opportunity to comment on the proposed rules, and respectfully requests that the Commission give serious consideration to our submission.

Sincerely,



Thomas L. Spangler  
Chairman, Board of County Commissioners